

NO. 49656-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THOMAS READE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

A.	ASSIGNMENT OF ERROR	1
	Issue pertaining to assignments of error	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	4
	THE SENTENCING COURT FAILED TO TAKE INTO ACCOUNT READE’S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.....	4
D.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	4, 6
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016)	4
<i>State v. Leonard</i> , 184 Wn.2d 505, 358 P.3d 1167 (2015)	4, 6
<i>State v. Lundy</i> , 176 Wn.App. 96, 308 P.3d 755 (2013)	5
<i>State v. Marks</i> , 185 Wn.2d 143, 368 P.3d 485 (2016).....	4

Statutes

RCW 10.01.160(3).....	1, 4, 5
RCW 9A.28.020.....	1
RCW 9A.44.130.....	1
RCW 9A.88.010(2)(c)	1

Rules

RAP 2.5(a)	4
------------------	---

A. ASSIGNMENT OF ERROR

The sentencing court failed to take into account appellant's financial circumstances before imposing discretionary legal financial obligations.

Issue pertaining to assignments of error

Does the sentencing court's failure to comply with RCW 10.01.160(3) when imposing discretionary legal financial obligations as part of appellant's sentence require remand?

B. STATEMENT OF THE CASE

This is a consolidated appeal from convictions in four Thurston County cause numbers from 2004, 2005, 2006, and 2008. Under these cause numbers appellant Thomas Reade pleaded guilty to violation of sex offender registration requirements in April and November 2005, January 2006, and October 2008. CP 14-20, 41-48, 80-87, 122-28; RCW 9A.44.130. In the 2008 case he also pleaded guilty to two counts of attempted indecent exposure. RCW 9A.88.010(2)(c); RCW 9A.28.020. Reade filed notices of appeal in November 2016, indicating in a letter that he had never been advised of his right to appeal. CP 23, 26-35, 61, 66-76, 98, 103-13, 147, 152-63. This Court accepted the appeals as timely.

Reade was found indigent and represented by appointed counsel in each case. Supp. CP (Sub. No. 13, 04-1-02172-7, Minutes 12/23/04), (Sub. No. 5, 05-1-01468-1, Minutes 8/25/05), (Sub. No. 3, 06-1-00343-1, minutes 2/22/06); CP 119. In the 2004, 2005, and 2008 cases the court imposed only mandatory legal financial obligations. CP 7-8, 51-52, 134. The judgment and sentence in the 2006 action imposed discretionary fees as well. CP 91-92.

The joint sentencing recommendation in the 2006 case included mandatory fees and assessments, and the State presented no evidence regarding Reade's ability to pay legal financial obligations. CP 83; 5RP¹ 4, 6. Reade requested that he be allowed to serve his sentence on work release, telling the court at the plea and sentencing hearing that he wanted to try and change his life around. 5RP 6. The court did not inquire as to whether Reade had a job or what his financial prospects were. Other than Reade's hope that he would get his life back on track while on work release, the record contains no discussion or evidence regarding Reade's ability to pay. 5RP 1-7.

Nonetheless, the judgment and sentence contains the following boiler plate language:

¹ The Verbatim Report of Proceedings is contained in seven volumes, designated as follows: 1RP—4/26/05; 2RP—5/17/05; 3RP—11/17/05; 4RP—12/6/05; 5RP—3/14/06; 6RP—10/8/08; and 7RP—10/23/08.

ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 90. The court imposed the mandatory \$500 victim assessment, \$200 court costs, and \$100 DNA fee. CP 91. In addition the court ordered Reade to pay \$150 for court appointed defense expert and other defense costs, pursuant to RCW 9.94A.760. CP 91. The court also checked a box on the judgment and sentence form indicating that "In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50 per day...." CP 92. Reade did not object to the discretionary fees. 5RP 7.

In his motion for an order of indigency Reade certified that that he had previously been found indigent, there had been no change in his financial status, and he continued to lack sufficient funds to seek review. CP 24, 64, 99, 148. Orders of indigency were entered and appellate counsel was appointed. CP 36-37, 77-78, 114-15, 164-65.

C. ARGUMENT

THE SENTENCING COURT FAILED TO TAKE INTO ACCOUNT READE'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

Under RCW 10.01.160(3)² the sentencing court may order a defendant to pay legal financial obligations only if it first considers the defendant's individual financial circumstances and concludes the defendant has the ability, or likely future ability, to pay. The record here does not show that the trial court considered Reade's ability or future ability to pay before it imposed discretionary LFOs in the 2006 action.

Even though Reade did not object to the imposition of discretionary LFOs, as our Supreme Court has repeatedly recognized, this Court has discretion to review an objection to discretionary LFOs raised for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016); *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); *State v. Leonard*, 184 Wn.2d 505, 506-08, 358 P.3d 1167 (2015); *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) ("National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case."). This Court should exercise its powers under RAP 2.5(a) here and review

² This statutory provision has remained unchanged since Reade's 2006 sentencing.

the trial court's imposition of discretionary LFOs without first making an individualized inquiry into Reade's ability to pay.

For mandatory LFOs, the trial court does not have discretion to consider the defendant's ability to pay. "For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account." *State v. Lundy*, 176 Wn.App. 96, 102, 308 P.3d 755 (2013). But for discretionary LFOs, RCW 10.01.160(3) provides that a sentencing court

shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In *Blazina*, the Supreme Court held that this language obligates the court to inquire into the defendant's financial circumstances and ability to pay before imposing discretionary LFOs. Moreover, a cursory inquiry is insufficient:

[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838.

The fee for court-appointed counsel and defense costs imposed in this case is not a mandatory assessment. Nor is the assessment for costs of incarceration. *Leonard*, 184 Wn.2d at 507. Thus, imposition of these costs requires an individualized inquiry into Reade's financial circumstances and his current and future ability to pay. *Id.* The court failed to undertake this necessary inquiry. Moreover, nothing in the record would support the boilerplate finding included in the judgment and sentence.

Because the court failed to make the required inquiry into Reade's ability to pay, this Court should vacate the discretionary LFOs and remand for resentencing on this issue.

D. CONCLUSION

For the reasons discussed above, this Court should vacate the discretionary LFOs and remand for resentencing.

DATED June 13, 2017.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. Thomas Reade*, Cause No. 49656-9-II as follows:

Thomas Reade DOC# 837659
Monroe Correctional Complex-TRU
PO Box 777
Monroe, WA 98272

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
June 13, 2017

GLINSKI LAW FIRM PLLC

June 13, 2017 - 1:54 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49656-9
Appellate Court Case Title: State of Washington, Respondent v. Thomas Carl Reade, Appellant
Superior Court Case Number: 05-1-01468-1

The following documents have been uploaded:

- 7-496569_Briefs_20170613135331D2355142_9858.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 49656-9 State v Reade Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- Lavernc@co.thurston.wa.us
- PAOAppeals@co.thurston.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20170613135331D2355142